IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

TUESDAY, THE 14TH AUGUST 2007 / 23RD SRAVANA 1929

AS.No. 673 of 1993()

OS.435/1989 of II ADDL.SUB COURT,THRISSUR
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APPELLANT:DEFENDANT

N.S.SASIDHARAN, CONTRACTOR
NATTUKANTATHIL HOUSE, MADAPLATHURUTHU
MOOTHAKUNNAM P.O, N.PARAVUR TALUK
ERNAKULAM DISTRICT.

BY ADV. SRI.VIDYASAGAR
SRI.DINESH R.SHENOY

RESPONDENT: PLAINTIFF

THE KERALA LAND DEVELOPMENT CORPORATION LIMITED
CHEMBUKKAVU, THRISSUR.

BY ADV. SRI.M.P.ASHOK KUMAR
SRI.M.VENU GOPAL

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 14/08/2007 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

A.S No. 673 of 1993

Dated this the 14th day of August 2007

JUDGMENT

The sole defendant in O.S 435/1989 on the file of the Suboodinate Judge Thrissur is the appellant. The appeal is filed against a decree and judgment passed by the court below by which it decreed the suit filed by the respondent corporation for money. The appellant entered into an agreement with the respondent to execute a work in Thrissur Kole Development project - forming the left bund of Nedumthodu part- A from Ch. OM to 3512M and executed an agreement on 9-5-1980. The respondent corporation filed a suit contending that the appellant failed to execute the work and hence the work was terminated subject to certain terms and conditions and supplementary agreement was executed between the appellant and respondent on 5-3-1986. It was contended that appellant had agreed to repay the respondent Corporation an excess amount which he had already received while settling the final bill. . On 10-6-1986 the appellant himself wrote a letter requesting the respondent corporation to adjust his earnest money deposit in another work towards his liability and to grant time for remitting the balance. It was contended that the final bill for the work was passed on 30-10-1986. and it was found that an amount of Rs. 60,362.55 was received by the appellant in excess of the amount actually due to him. After adjusting an amount of

Rs. 12,564.40 an amount of Rs.47,798.15 was still due to the respondent corporation from the appellant. It is also contended that several demands were made and a notice was also issued demanding Rs. 47,798.15 with interest at 18% percent per annum from 11-12-1986 . Though the appellant received the notice he did not repay the amount Hence the suit.

2. The appellant filed written statement contending that no amounts was due from him to the respondent corporation. It was contended that he had entered into an agreement in the year 1980 for execution of the work. It was contended that the appellant performed everything as per the terms of the agreement and it was the respondent who committed breach of contract. It was contended that the appellant had executed more that 90% of the work and there was no default or negligence on his part. It was contended that during the course of work two part payment of bills were presented; but the Corporation did not pay the amounts covered by those bills. Since the Corporation did not pay the money for the work done the appellant found it difficult to proceed the further work and hence he was forced to stop the work. It was contended that after the stoppage of the work there was heavy rain and because of the floods the major portion of the work was destroyed. It was contended that agreement alleged to have been executed on 5-3-1986 was brought into existence exerting undue influence and coercion by threatening that the work will be re-tendered at his risk and cost. It was contended that such an agreement was not enforcible and it was against the public policy. It was contended that the final bill measurement was taken after the bund

was destroyed due to heavy rains and the final measurement taken was not correct. It was contended that the respondent Corporation was not entitled to get any relief on the basis of the supplementary agreement. The averment that the an amount of Rs. 47,798.15 is due from him was denied. It was also contended the respondent has retained 5% of the amount due as per the prior bills of the appellant and more than a lakh of rupees was outstanding as retention amount and the respondent was illegally retaining that amount. The claim for interest was denied. It was contended that the suit is barred by limitation.

3. On the side of the Plaintiff PWs 1 to 3 were examined Exts A1 to A27 were proved and marked. Appellant gave evidence as DW1. The trial court found that the contention of the appellant that Ext. A1 supplementary agreement was executed exerting undue influence and coercion was not proved. A decree was passed in favour of the plaintiff allowing it to recover an amount of Rs. 47,798.15 with interest at the rate of 18%. Challenging that decree and judgment this appeal is filed.

4. The appellant entered into an agreement with the respondent corporation for execution of the work 'Thrissur Kole Development Project-forming the left bund of Nedumthodu part-A from Ch.OM. to 3512MA That agreement was terminated. The evidence on record shows that 94% of the work was done by the appellant/ contractor,. 12 part payment bills were presented and honoured. There was a delay in effecting payment on the last two part payment bills. The remaining work was not done by

the appellant and the contract was terminated by the respondent Corporation. The appellant accepted the termination on certain terms and conditions specified in Ext.A1 supplementary agreement executed between the appellant and the respondent on 5-3-1986. The specific case put forward by the respondent is that in Ext.A1 agreement the appellant had undertaken to repay any excess amount which he had already received prior to the termination of the work. The execution of Ext.A1 agreement was admitted. But it was contended by the appellant that the respondent taking undue advantage of the helplessness of the appellant and threatening to re-tender the work at his risk and cost. fraudulently got executed Ext.A1 agreement. . According to the appellant Ext.A1 was not legal and binding Though the appellant contended that Ext.A1 was executed on account of the undue influence and coercion,exerted on him. No evidence was adduced to prove it. The respondent corporation is an undertaking of the Government of Kerala. There was absolutely no evidence available to prove the threat, collusion threatening undue influence etc. On the side of the respondent PW2 who attested Ext.A1 agreement was examined. PW2 deposed that he saw that the appellant as well as the construction engineer affixing their signatures in the document at the construction engineer's office. The project Engineer of the plaintiff corporation is examined as PW1 The oral testimony of PW1 shows that the appellant was agreeable to terminate the work as a result of that Ext.A1 supplementary agreement was come into force by the respondent corporation and the appellant. PW1 was not present at the time of Execution of A1 agreement. He gave oral evidence as directed by his

superior officers. The trial court relied on the evidence of PW2. In fact the appellant had also not adduced any evidence to prove threatening, undue influence, and coercion etc. So the finding of the court below that the appellant voluntarily executed Ext.A1 agreement is perfectly correct and does not call for interference. There is yet another aspect. . The amount claimed by the respondent is not for any damage or loss which sustained on account of the stoppage of the work by the appellant. The specific case put forward by the respondent is that it is the excess payment received by the appellant. Exhibit A5 is the measurement book. in page 75 of the book the appellant himself has endorsed that the levels recorded from pages 7 to 68 was accepted. Based on that measurements on 25-9-1985 the amount due to the respondent was calculated and it was found that he had received an amount of Rs,60,639/- in excess of what was actually due to him. This is the measurement which was subsequently check measured and that fact is clear from the perusal of the final bill produced in the case. Though the appellant have got a case that the final measurements were taken on 31-10-1986 that cannot be true because the final bill was prepared prior to that date. based on the actual measurements taken which was check measured. So it is not the amount ascertained after execution of Ext.A1. Ext.A1 was executed only in the year 1986 whereas as early as on 24-9-1985 based on the measurements of work done by the appellant it was found out that the appellant had received an ,excess amount of 60,639./- The appellant had written a letter to the respondent Corporation that the some amounts are due to him and that may be adjusted towards this amount. He also sought for some

more time to repay the balance. An amount of Rs 12,564.40 was outstanding on the credit of the appellant The respondent corporation deducted that amount from the excess amount due to it. and claimed a balance amount of Rs. 45,798.50 Since that amount was the excess amount received by the appellant before termination of the contract, the respondent is entitled to claim back that amount. So the finding of the court below that the appellant was liable to pay 47,798.50 as claimed by the respondent is correct.

6. The respondent Corporation had claimed interest at the rate of 18% from 11-12-1986. There is absolutely no agreement to pay 18% interest. The various letters and files shows that the appellant executed more than 94 percent of the work and two part bills presented by him were not honoured in time. There was delay for about six months in paying the amount covered by those bills. A letter written by the project engineer to the head office will show that there was failure on the part of the Corporation to supply the material and money to the appellant in time . That was the valid reason why they had also agreed to terminate the contract without risk and cost of the appellant. If the respondent were prompt in discharging their duties the appellant would have finished the remaining six percent of the work also. If the appellant was allowed to complete the work, the department could have adjusted the excess amount which they paid in the final bill itself. In view of the fault on the part of the corporation I am of the view that it is not just and proper to allot them to recover 18% interest. So the claim of Rs. 21,509 being 18%

interst from 11-12-1986 till the date of filing of the plaint cannot be allowed. I am of the view that only interest at the rate of 6% per annum from the date of plaint till the realisation can be allowed in this peculiar facts and circumstances of the case.

7. In the result, the appeal is allowed in part The finding of the court below that the respondent is entitled to get an amount of Rs. 47,798.15 being the excess amount received from the respondent is confirmed But the decree is modified, allowing the plaintiff to recover the amount of Rs. 47,798.15 with interest at the rate of 6% from the date of plaint till the date of realisation Parties were directed to suffer their respective costs.

K.PADMANABHAN NAIR,JUDGE

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